State of Rhode Island and Providence Plantations

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Patrick C. Lynch, Attorney General

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Dear Solicitor:

A misleading story that appeared in *The Providence Journal* this past Sunday, December 11, has caused much confusion in the public and perpetuated a misunderstanding that has existed in some cities and towns about exactly what the Open Meetings Act (OMA, or Act) does and does not allow. I am writing to provide you with the same information my office provided the *Journal* reporter and trust, once you've read this information, that you will have a better understanding of both the substance of my office's March 2005 advisory opinion, In re Exeter-West Greenwich Regional School District, ADV OM 05-02 (copy enclosed), and of my intent in providing this advisory opinion.

First of all, it is important to understand that the Open Meetings Act is a law passed by the Rhode Island General Assembly. My office did not draft the Act but it does enforce it. My office also explains the law to public bodies informally through phone calls and e-mails from staff attorneys, more formally through community meetings, and most formally through legal opinions (advisories) issued in response to specific written questions from affected public bodies. Our advice is simply designed to explain the law as written by our legislature, not to legislate or to create new law.

Second, at no point in the advisory opinion did my office advocate the legal position that members of a public body must sit silent during the public comment period of an open meeting. Indeed, the only mention of the word "silent" in this opinion appeared on Page 2: "The OMA is silent on the issue of the public comment portion of an open meeting." Why the *Journal* would report *"the Attorney General says public officials shouldn't respond to the public's questions"* (the emphasis here is mine) is open to conjecture, but the article itself is, unfortunately, just plain wrong.

The formal advisory opinion we issued in March of 2005, In re Exeter-West Greenwich Regional School District, is all about notice. It observed that under Rhode Island's Open Meetings Act a "quorum" of a public body couldn't collectively discuss a matter over which it has supervision, jurisdiction, control, or advisory power—for example, such as raising your citizens' taxes—without adequate public notice. It matters little whether a non-noticed matter is raised by the public body itself, which then engages in a collective discussion, or whether the non-noticed matter is first raised by a citizen, which then leads the public body to engage in a collective discussion. The result is the same—the public body is engaging in a collective discussion concerning the public's business and, according to the OMA, the public has the right to be

notified of the nature of all matters that will be discussed and acted upon at a public meeting. To do otherwise violates both the spirit and letter of the OMA.

A Rhode Island Supreme Court opinion that came out in July of 2005 validated my office's March 2005 advisory. The Court's opinion discussed the importance of public notice and how its requirement is consistent with the Open Meeting Act's purpose that "citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." R.I. Gen. Laws § 42-46-1; see Tanner v. Town Council of the Town of East Greenwich et al., 880 A.2d 784 (RI 2005).

"[W]e hold that the requirement that a public body provide supplemental notice, including a 'statement specifying the nature of the business to be discussed,' obligates that public body to provide fair notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon[,]" the Supreme Court said. Id. at 797. In short, the Court was saying that public bodies must provide **sufficiently** specific notice, which is exactly what my office's advisory opinion recommended.

Consistent with the foregoing, let me highlight several matters within our advisory opinion and the OMA that strike the required balance between a citizen's ability to provide public comment (and receive feedback), as well as the public's right to receive public notice of matters that will be discussed at a public meeting. First, it is important to observe that the OMA applies only to a "quorum" of a public body, defined to be "a simple majority of the membership of a public body." R.I. Gen. Laws § 42-46-2(d); see also, Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999).

Although the recent newspaper article represented that this Department's position is that public bodies must remain "in silence," I repeat that we never said that. Why? Because the OMA simply does not apply to a situation where less than a quorum of a public body engages in a discussion. To be sure, the OMA does prohibit a collective discussion or action by a "quorum" of a public body on matters not properly noticed, but the OMA also expressly permits a majority of a public body, other than a school committee, to amend its agenda at **any** time during a public meeting. As the OMA provides, "[s]uch additional items shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body or official." R.I. Gen. Laws § 42-46-6(b).

This means that our Legislature has already provided a way for all public bodies, except school committees, to discuss any matter raised in a public comment session. In this vein, it is important to note that although the newspaper article expressed numerous comments from, and references to, non-school committee public bodies, our advisory opinion was specifically issued to a school committee. As you are undoubtedly aware, the OMA contains important provisions applicable only to school committees. For instance, our Legislature has decided that a school committee must provide a more formal notice through a pre-approved agenda to the public before it holds impromptu discussions about important public matters. Indeed, according to the OMA, and in stark contrast to all other public bodies, a school committee cannot amend its agenda less than 48

hours prior to a meeting. R.I. Gen. Laws § 42-46-6(d). Because all other public bodies can amend their agendas at any time, our advisory opinion to a school committee should not be read by other public bodies as prohibiting them from discussing a matter raised by the public; such bodies should continue to amend their agendas pursuant to R.I. Gen. Laws § 42-46-6(b).

Although the ultimate decisions concerning what policies and practices a public body will employ rest entirely with each entity under the advice of the body's own legal counsel, the Open Government Unit of the Department of Attorney General is committed to assisting public bodies as their members strive to comply with the Open Meetings Act. As has been the case in recent years, this office is available to provide unofficial, non-binding advice over the phone to legal counsel, or official, advisory opinions (by request of legal counsel only) regarding the state's open government laws.

You play an important role in ensuring that local government remains open and accountable to the public. I look forward to continuing our efforts toward safeguarding the public's right to speak on issues that have been properly noticed at open meetings. I also would encourage you to forward this letter to the legal counsels who represent other public bodies in your city or town.

Very truly yours,

Patrick C. Lynch
Attorney General

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Enclosure